87-2060

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1987

KENNETH N. MORAN,

Petitioner,

vs.

STATE OF MONTANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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QUESTIONS PRESENTED FOR REVIEW

WHETHER DEFENSE COUNSEL'S FAILURE TO OBJECT TO EVIDENCE (ADMISSIBLE UNDER FEDERAL AND STATE LAW) RISES TO THE LEVEL OF "MANIFEST NECESSITY" SUCH THAT THE COURT'S SUA SPONTE DECLARATION OF MISTRIAL ALLOWS RETRIAL OVERRIDING THE PETITIONER'S FIFTH AMENDMENT RIGHT BARRING "DOUBLE JEOPARDY."

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW . i

LIST OF ALL PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW vi

JURISDICTION vii

CONSTITUTIONAL PROVISIONS INVOLVED vii

STATEMENT OF CASE 1

REASON FOR GRANTING THE WRIT

A. "DOUBLE JEOPARDY" BARS RETRIAL OF PETITIONER WHERE THERE WAS NO "MANIFEST NECESSITY" FOR DECLARATION OF MISTRIAL 5

B. "MANIFEST NECESSITY" AND INEFFECTIVE ASSISTANCE OF COUNSEL (MONTANA SUPREME COURT CONFLICTS WITH FEDERAL CIRCUIT COURTS OF APPEAL) 7

C. THE DECISION OF THE MONTANA SUPREME COURT IGNORES THE STANDARDS OF THE UNITED STATES SUPREME COURT AND FEDERAL CIRCUIT COURTS IN DETERMINING BIAS SUFFICIENT TO WARRANT MISTRIAL AND SUBSEQUENT RETRIAL 14

CONCLUSION 17

CERTIFICATE OF MAILING 20

APPENDIX

A. OPINION OF THE MONTANA SUPREME COURT (JAN. 15, 1988) . A1-A35

B. OPINION OF THE MONTANA SUPREME COURT (APR. 21, 1988) . B1-B23

C. DISTRICT COURT ORDER GRANTING MOTION TO DISMISS ON GROUNDS OF DOUBLE JEOPARDY (JAN. 8, 1987-BYRON L. ROBB) .. C1-C14

D. DISTRICT COURT AFFIDAVIT (RICHARD NELLEN) D1-D3

E. DISTRICT COURT AFFIDAVIT (KENNETH N. MORAN) E1-E2

TABLE OF AUTHORITIES

CASES	PAGE
Abdi v. Georgia 744 F.2d 1500 (11th Cir. 1984)	12
Arizona v. Washington 434 U.S. 497, 506, 54 L.Ed.2d 717, 728, 98 S.Ct. 824, 830 (1978)	6,12 14
Bivens v. State 242 Ark. 362, 413 S.W.2d 653 (1967)	17
Braxton v. United States 395 A.2d 759 (D.C. App. 1978)	9,13
Diaz v. United States (La. D.C.), 264 F.Supp. 937, affd. per curiam, 391 F.2d 932 (5th Cir. 1967)	16
Douglas v. United States 488 A.2d 121 (D.C. App. 1985)	7,8,13 15
Downum v. United States 372 U.S. at 738, 83 S.Ct. at 1035	8,9
Espinoza v. District Court in and for the County of Conejos 180 Colo. 391, 506 P.2d 131 (1973)	9
Harris v. Washington 404 U.S. 55, 30 L.Ed.2d 92 S.Ct. 183 (1971)	vii

Illinois v. Somerville
410 U.S. 458, 464, 35 L.Ed.2d
425, 431, 93 S.Ct. 1066 (1973) . 15

Lovett v. Commonwealth
393 Mass. 444, 472 N.E.2d
236 (1984) 12

Miranda v. Arizona
384 U.S. 436, 16 L.Ed.2d
694, 86 S.Ct. 1602 (1966) 11,12

North Carolina v. Butler
60 L.Ed.2d 286, 99 S.Ct.
1755 (1979) 11

State v. Blakney
197 Mont. 131, 641 P.2d
1045 (1982) 11

State v. Gleed
713 P.2d 543 (1986) 11

State v. McDaniel
272 N.C. 446, 158 S.E.2d
874 (1968) 12

United States v. Dinitz
424 U.S. 600, 47 L.Ed.2d
267 (1976), 96 S.Ct. 1075 12

United States v. Horn
583 F.2d 1124 (10th Cir.) 15

United States v. Perez
9 Wheat 579, 580, 6 L.Ed.
165 (1824) 5,6,7
8,14
17

United States v. Sanders
591 F.2d 1283, 1299
(9th Cir. 1979) 15
United States v. Starling
571 F.2d 934 (5th Cir. 1978) ... 15

Wright v. United States
365 A.2d 365 (D.C. App. 1976) .. 7,10

OPINIONS BELOW

The State Trial Court entered its Order on January 8, 1986, granting petitioner's Motion to Dismiss on "double jeopardy" grounds. The Montana Supreme Court reversed and remanded for trial on January 15, 1988. A copy of the Memorandum is attached as Appendix A. Two (2) Justices dissented. Justice Sheehy urged "appeal to the highest court of this land." See Appendix Exhibit A page A28.

Petitioner filed a Petition for Rehearing on January 15, 1988. The decision of January 15, 1988 was withdrawn and a second opinion remanding the matter for trial was issued on April 21, 1988. See Appendix Exhibit B.

JURISDICTION

On April 21, 1988, the Montana Supreme Court entered Judgment reversing the District Court's Order Granting Motion to Dismiss and remanding for trial. See Appendix Exhibit B.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).[1]

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5 United States Constitution:

> [Criminal Actions - Provisions concerning - Due process of law and just compensation clauses.]

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[1]For purposes of a Petition for Writ of Certiorari to the United States Supreme Court a finding of the highest state court that retrial is not barred by "double jeopardy" is a "final order." Harris v. Washington, 404 U.S. 55, 30 L.Ed.2d 212, 92 S.Ct. 183 (1971).

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14 United States Constitution:

> Section 1. [Citizenship - Due process of law - Equal protection.]
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF CASE

On May 5, 1986, Ken Moran, the petitioner, was charged by information with the crime of forgery by accountability, or in the alternative, forgery by conspiracy. On May 28, 1986, petitioner Moran was charged with witness tampering. Those cases came on for trial before a jury on September 22, 1986. The jury was empaneled and sworn. On the morning of September 23, 1986, the Court sua sponte declared a mistrial. The Court (Judge Olson) based its declaration of mistrial on ineffective assistance of defendant's counsel. The record additionally reveals the initial Trial Judge's concern about the flaws in the Public Defender System in Gallatin County, Montana, which the Trial Judge indicated did not provide adequate

training and experience for public defenders. (Tr. pp.216, 217, 218, 220, 221).[2]

The federal question concerning the "double jeopardy" issue of the United States Constitution Amendment 5 was initiated by the filing of a Motion to Dismiss with the Trial Court (Judge Robb) on the grounds of "double jeopardy." The Trial Court granted petitioner's Motion to Dismiss finding

---

[2] On Motion to Dismiss on "double jeopardy" basis, defense counsel presented to State District Court Judge exhibits showing low levels of funding by Gallatin County, Montana for indigents as compared to other similar jurisdictions in Montana. Defense counsel raised as an alternative issue before the State Trial Court and Montana Supreme Court that if there was indeed ineffective assistance of counsel it was a result of the failure to properly fund public defenders - a denial of Moran's Sixth Amendment right. The Montana Supreme Court, while finding ineffective assistance of counsel, failed to address that issue.

that there was no "manifest necessity" for the declaration of a mistrial and no ineffective assistance on the part of defense counsel. See Judge Robb's Order, Appendix Exhibit C.

In Montana, there is no intermediate appellate court. On appeal, the Montana Supreme Court, the court of last resort, also considered and ruled on the constitutional issue of "double jeopardy" raised by the petitioner.

In its original opinion, the Montana Supreme Court reversed the Trial Court's decision finding ineffective assistance of counsel solely on the basis that defense counsel failed to object to an unsigned rights card and the subsequent statements of petitioner to law enforcement. The Montana Supreme Court cites no other act or omission on the

part of defense counsel as a basis for ineffective assistance of counsel.

In his Petition for Rehearing, petitioner Moran apprised the Court that there is no state or federal law which requires the signing of a rights card to allow the admissibility of a subsequent voluntary statement. See footnote 3 page 11 this Petition.

The Montana Supreme Court denied the Petition for Rehearing on April 21, 1988, again asserting ineffective assistance of counsel based solely on the failure of defense counsel to object to the introduction of an unsigned rights card and the subsequent statement of petitioner to law enforcement.

REASON FOR GRANTING THE WRIT

A. "DOUBLE JEOPARDY" BARS RETRIAL OF PETITIONER WHERE THERE WAS NO "MANIFEST NECESSITY" FOR DECLARATION OF MISTRIAL

In United States v. Perez, 9 Wheat 579, 580, 6 L.Ed. 165 (1824), this Court asserted the test to be applied in resolving the defendant's right to forego trial after the declaration of a mistrial:

> We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under

> urgent circumstances, and for very plain and obvious causes . . . (Emphasis added).

The "manifest necessity" test of Perez continues to provide the basis for balancing the propriety of granting a mistrial with the defendant's right to not be placed twice in jeopardy for the same offense. See Arizona v. Washington, 434 U.S. 497, 506, 54 L.Ed.2d 717, 728, 98 S.Ct. 824, 830 (1978).

While the "manifest necessity" test is accepted in all Circuit Courts and has continued to be enunciated by this Court, the Montana Supreme Court failed to apply the criteria of Perez and subsequent precedent of Circuit Courts and State Courts. The Montana Supreme Court's decision is in conflict with that authority in determining that the facts in the case at bar were "circumstances which would render it

proper to interfere" (Perez at page 580) with the trial.

B. "MANIFEST NECESSITY" AND INEFFECTIVE ASSISTANCE OF COUNSEL (MONTANA SUPREME COURT CONFLICTS WITH FEDERAL CIRCUIT COURTS OF APPEAL)

No United States Supreme Court decision addresses the factual situation of the case at bar.

Several United States Circuit Courts of Appeal have rendered opinions where ineffective assistance of counsel was relied upon as the basis for mistrial. With the exception of Wright v. United States, 365 A.2d 365 (D.C. App. 1976) (distinguished infra), the circuit cases have barred retrial of the petitioner where mistrial was granted for ineffective assistance of counsel.

In Douglas v. United States, 488 A.2d 121 (D.C. App. 1985), the court

barred a retrial of the defendant where a mistrial was declared sua sponte because the trial court concluded the defendant could not receive effective assistance of counsel where the defendant had filed a complaint against his attorney with the Bar several weeks before trial. The circuit court reversed as defendant was willing to waive ineffective assistance of counsel. Douglas, supra at page 132, relying on Perez and subsequent decisions stated:

> A mistrial without defense consent is therefore justified "only in very extraordinary and striking circumstances." Downum v. United States, 372 U.S. 734, 736, 10 L.Ed.2d 100, 83 S.Ct. 1033, 1034 (1963). . .
>
> Second, even where there is a high degree of necessity that would ordinarily justify a mistrial, the trial judge must determine whether an alternative measure - less drastic than a mistrial - can alleviate the problem so that

> the trial can continue to an impartial verdict.

See also Braxton v. United States, 395 A.2d 759 (D.C. App. 1978) where the trial court's perception of ineffective assistance of counsel resulted in sua sponte declaration of mistrial. The reviewing court found counsel's conduct imperfect, but not willful or designed to produce a mistrial. Braxton at page 772. In barring retrial, Braxton found at page 773: "[W]e resolve any doubt 'in favor of the liberty of the citizen, rather than [in favor of] exercise [of] what would be an unlimited, uncertain, and arbitrary judicial discretion.'" Downum v. United States, supra, 372 U.S. at 738, 83 S.Ct. at 1035.

See also Espinoza v. District Court in and for County of Conejos, 180 Colo. 391, 506 P.2d 131 (1973) barring

retrial where ineffective assistance of counsel was basis for mistrial. The court finding counsel's actions either entirely permissible or minor improprieties.

While it is important to note that in Wright v. United States, supra, retrial was permitted where mistrial was granted for ineffective assistance of counsel, the facts are easily distinguishable from the case at bar. In Wright, defense counsel made willful and improper remarks, and did nothing to prepare for trial, including failure to talk with defendant and critical witnesses. In the case at bar, defense counsel worked diligently in the performance of his duties as acknowledged by the Montana Supreme Court opinion at page B14, Appendix Exhibit B.

Defense counsel's actions do not rise to the level of ineffective assistance of counsel where the petitioner was given his rights and his subsequent statement to law enforcement officers was voluntary,[3] and where the statements were consistent with the

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[3] Law enforcement and defense counsel testified petitioner was given his rights and voluntarily waived his rights. (Tr. pp.147, 150, 151). Montana case law allows the introduction of statements where defendant's rights are given and voluntarily waived. State v. Blakney, 197 Mont. 131, 641 P.2d 1045 (1982); State v. Gleed, 713 P.2d 543 (1986) (Montana court holding specifically that failure to sign a waiver will not result in suppression of a statement); see also Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966) (recognizing that one can waive his rights if knowing and voluntary); North Carolina v. Butler, 60 L.Ed.2d 286, 99 S.Ct. 1755 (1979) (signed written waiver not necessary to waive rights).

testimony petitioner was to give on his own behalf,[4] and where defendant and counsel had discussed this testimony in their trial strategy.[5]

While retrial has been granted for improper argument of defense counsel, Arizona v. Washington, 434 U.S. 497, 54 L.Ed.2d 717, 98 S.Ct. 824 (1978); Abdi v. Georgia, 744 F.2d 1500 (11th Cir. 1984); Lovett v. Commonwealth, 393 Mass. 444, 472 N.E.2d 236 (1984); United States v. Dinitz, 424 U.S. 600,

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[4] Petitioner would testify to the same facts at time of trial as those given to law enforcement as his statements were consistent with his defense. Admission of evidence in violation of Miranda rule not prejudicial where defendant testified to same facts as those contained in such evidence. State v. McDaniel, 272 N.C. 446, 158 S.E.2d 874 (1968).

[5] See Affidavit of petitioner and petitioner's trial counsel submitted to the Trial Court and Montana Supreme Court delineating trial strategy. See Appendix Exhibits D and E.

47 L.Ed.2d 267 (1976), 96 S.Ct. 1075, each of those cases involved a willful act and impropriety by defense counsel. The actions of petitioner's counsel were trial strategy and not willful acts of unscrupulous defense counsel.

Furthermore, the Trial Court infringed on the petitioner's right to make decisions central to his defense. Petitioner and his counsel relied upon those statements to law enforcement to add credibility to petitioner's subsequent consistent testimony. See Appendix Exhibits D and E. Even though the Trial Court may have thought the strategy detrimental to petitioner, petitioner's choice in his defense must be honored.[6] Douglas, supra at pages 141, 142; see also Braxton at page 769.

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[6] Note - trial counsel Richard Nellen remains as counsel of record for petitioner at petitioner's request.

The Trial Court's misperception of defense strategy does not rise to the level of "manifest necessity" to allow retrial.

C. THE DECISION OF THE MONTANA SUPREME COURT IGNORES THE STANDARDS OF THE UNITED STATES SUPREME COURT AND FEDERAL CIRCUIT COURTS IN DETERMINING BIAS SUFFICIENT TO WARRANT MISTRIAL AND SUBSEQUENT RETRIAL

United States v. Perez, supra, requires a "high degree" of necessity in granting a mistrial. Reviewing courts have an obligation to satisfy themselves that the trial judge exercised sound discretion. Arizona v. Washington, supra at 514; Perez, supra at 580.

A trial judge properly exercises his right to declare a mistrial if there is such bias that an impartial verdict cannot be reached, or there is improper conduct of such a nature that a conviction would likely be reversed

on appeal. Douglas v. United States, supra at page 132; Illinois v. Somerville, 410 U.S. 458, 464, 35 L.Ed.2d 425, 431, 93 S.Ct. 1066 (1973).

This bias cannot be assumed. United States v. Sanders, 591 F.2d 1283, 1299 (9th Cir. 1979) (barring retrial where a judge granted mistrial on basis of perjury of prosecution's witness, no bias shown to defendant); United States v. Horn, 583 F.2d 1124 (10th Cir.) (barring retrial for declaration of mistrial where jury had been deadlocked and court failed to allow sufficient time to deliberate after giving Allen charge); United States v. Starling, 571 F.2d 934 (5th Cir. 1978) (declaration of mistrial on juror bias - bias unfounded and only judge misperceptions).

There can be no finding of bias in the case at bar, as any bias the Trial

Court perceived, rightfully or wrongfully, by introduction of the unsigned rights card and testimony was eliminated by the Trial Court's refusal to allow its admission. See Montana Supreme Court decision at pages B9-B10, Appendix Exhibit B, acknowledging that subsequent testimony of petitioner to law enforcement and the rights card were not admitted. There can be no finding of bias to warrant mistrial when the perceived prejudicial evidence. See Diaz v. United States, (La. D.C.), 264 F.Supp. 937, affd. per curiam, 391 F.2d 932 (5th Cir. 1967). Having eliminated the concerns of the Court there was nothing to remedy, and thus, no need to declare a mistrial.

In addition, as this evidence was admissible under state and federal law, (see footnote 3 page 11, this Petition, infra), and was a defense strategy

there was no error meriting reversal on appeal. Bivens v. State, 242 Ark. 362, 413 S.W.2d 653 (1967) (Bivens allowing admission where defense did not object to introduction of statement where rights not given).

CONCLUSION

The Montana Supreme Court's decision to allow retrial of petitioner is in conflict with the United States v. Perez, supra, and controlling Circuit Court decisions requiring "manifest necessity" for retrial of a defendant after the declaration of a mistrial. "Manifest necessity" requires bias such that an impartial verdict cannot be reached or that the matter will be reversed on appeal.

No "manifest necessity" existed for declaration of mistrial on the

basis of ineffectiveness of counsel where:

(1) Defense counsel's actions were proper and diligent;

(2) Defense counsel did not commit a willful act to trigger mistrial;

(3) Defense counsel properly applied the federal and state law in determining the admissibility of petitioner's statements to law enforcement;

(4) Defense counsel and petitioner discussed trial strategy including the admission of statements made to law enforcement;

(5) No action of defense counsel was reversable on appeal;

(6) Assuming arguendo, that the statements of petitioner were inadmissible, any bias such that an impartial verdict could not be

rendered, was remedied by the Trial Court's exclusion of petitioner's statements to law enforcement, thus there was no prejudice to petitioner and no bias to prohibit an impartial verdict.

In the words of dissenting Montana Justice Sheehy, the petitioner requests that a Writ of Certiorari issue to review the Judgment of the Montana Supreme Court:

> There is no manifest necessity in this case because there was no urgency of circumstances which required the mistrial. Kenneth N. Moran, having been once in jeopardy, is entitled to be discharged from these charges. I trust that Moran's present defense counsel will seek review of this decision in the highest court of the land, because the result is patently unjust.

RESPECTFULLY SUBMITTED this 15th day of June, 1988.

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CERTIFICATE OF MAILING

I, Claire Svejkovsky, do hereby certify that on the 15th day of June, 1988, I mailed three (3) true and correct copies of the foregoing document upon the following parties of record in this matter:

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Secretary

APPENDIX

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VOLUME 45

No. 87-155

STATE OF MONTANA,

Plaintiff and Appellant,

v.

KENNETH N. MORAN,

Defendant and Respondent.

Submitted: Oct. 27, 1987
Decided: Jan. 15, 1988

CRIMINAL LAW, Forgery--ATTORNEYS AT LAW, Appeal from order granting dismissal of four criminal charges against defendant where the trial judge on his own motion declared a mistrial during the first trial. The Supreme Court held that the trial judge exercised sound discretion when he found manifest necessity for mistrial, and there was no basis for reversal of that decision by the subsequent trial judge who granted dismissal of all charges against defendant.

Appeal from the Eighteenth Judicial District Court, Gallatin County, Honorable Byron Robb, Judge

For Appellant: Mike Greely, Attorney General, Helena

Robert F. W. Smith,
Asst. Atty. General,
Helena
A. Michael Salvagni,
County Attorney,
Bozeman
Marty Lambert, Deputy
County Attorney,
Bozeman

For Respondent: Leanne Schraudner,
Bozeman
Richard Nellen,
Bozeman

Mr. Smith and Mr. Lambert argued the case orally for Appellant; Ms. Schraudner for Respondent.

Opinion by Justice Weber; Chief Justice Turnage and Justices Harrison, Gulbrandson and McDonough concur. Justice Sheehy and Justice Hunt dissent and filed opinions.

Reversed and remanded.

[45 St.Rptr. 79]

Mr. Justice Weber delivered the Opinion of the Court.

The State of Montana appeals an order granting dismissal of four criminal charges against the defendant in the Eighteenth Judicial District, Gallatin County. We reverse and remand for trial.

The issue is whether the District Court committed error by granting defendant's motion to dismiss.

In May, 1986, Mr. Moran was charged with the crime of forgery by accountability or in the alternative, conspiracy to commit forgery. Later that month he was charged with two counts of witness tampering. The two cases were consolidated by the District Court, and trial began on September 22, 1986. The jury was empaneled and sworn on that day, and the prosecution presented six witnesses. This was defense counsel's first felony criminal trial before a jury. On the morning of the second day of trial, before any more testimony was offered, the trial judge on his own motion declared a mistrial. The basis for this action was the court's belief that defendant was being denied effective assistance

of counsel and that manifest necessity required mistrial. The defense raised no objection to mistrial, although the State did object.

The court scheduled the matter for retrial in November, 1986. As the parties prepared for retrial, the original trial judge was substituted. The substitute judge then ordered briefs on the issue of retrial and double jeopardy, pursuant to defendant's motion to dismiss. Subsequently, this substitute judge granted the motion.

Did the District Court commit error by granting defendant's motion to dismiss?

We accord great deference to the trial judge's findings and conclusions when the judge heard the witnesses and observed their demeanor. Similarly, we accord deference to the trial judge's

judgment as to competence of counsel when the judge heard and observed his performance as criminal defense counsel, both in chambers and in the courtroom during voir dire and trial. The substitute judge likewise should accord great deference to the original trial judge on these matters. The substitute judge in effect reversed the trial judge, having reviewed only seven pages of a trial transcript which when complete contains 221 pages of voir dire, testimony, and in-chambers discussions. For these reasons, the substitute judge's order of dismissal will not receive the same deference as the action by the trial judge.

We now consider whether the trial judge abused his discretion in finding manifest necessity for mistrial. The trial judge's action was motivated by his concern for defendant's

constitutional right to effective assistance of counsel. Because the decision to order mistrial was made to protect defendant's constitutional interests, that decision will receive a high degree of deference on review. See United States v. Sanders (9th Cir. 1979), 591 F.2d 1293, 1297 (stating "A trial judge's decision to declare a mistrial because of possible juror bias is also deserving of great deference."); see also Wright v. United States (D.C. 1976), 365 P.2d 365. The defendant's interest in effective assistance of counsel, however, must be considered in light of his Fifth Amendment right not to be placed twice in jeopardy. Jeopardy attaches when the jury is empaneled and sworn. State v. Carney (Mont. 1986), 714 P.2d 532, 535, 43 St.Rep. 54, 58. In this case, jeopardy had attached. The

constitutional protection against double jeopardy bars a second criminal trial "unless there was a 'manifest necessity' to terminate the trial or defendant acquiesced in the termination." Carney, 714 P.2d at 535.

If the trial judge exercised sound discretion, if he acted rationally and responsibly, his order of mistrial will be affirmed. Arizona v. Washington (1978), 434 U.S. 497, 514, 98 S.Ct. 824, 54 L.Ed.2d 717. Upon review, "[t]he record must support the explicit or implicit finding of manifest necessity." United States v. Jarvis (9th Cir. 1986), 792 F.2d 767, 769. Our review of the record convinces us that the trial judge acted responsibly, exercising sound discretion when he found manifest necessity for a mistrial.

The trial judge concluded that counsel was too inexperienced to defend a major felony charge involving conspiracy and accountability theories. His determination, unlike that of the substitute judge's, was based upon the entire pretrial and trial process up to the point of mistrial, and the record supports his determination. One graphic example was the failure of defense counsel to object to the admission of State's exhibit 38. That exhibit was the foundation for an alleged admission by the defendant. Exhibit 38 was offered into evidence through State's witness, Deputy Sheriff Robert Christie. The card, referred to as a rights card, contains a statement of the defendant's right against self-incrimination and his right to assistance of counsel. The form provides a line for the signature of

defendant should he make a signed waiver. In this case, Mr. Moran did not sign the card. The card also provides for an oral waiver of rights. This portion of Exhibit 38 appears as follows:

"The interviewee has read the above rights and declined to sign the above waiver. He was then asked, 'Do you want to use any of these rights before we ask you questions?' He answered: '_____

_____.'

OFFICER: s/Robert Christie"

Exhibit 38 was not completed properly since the officer failed to register Mr. Moran's answer, if any, to the question, "Do you want to use any of these rights before we ask you questions?" In addition, the officer could not explain why he failed to get Mr. Moran's signature for a written

waiver or, in the alternative, why he failed to record an oral waiver, if any. On direct examination by the State, Officer Christie testified:

"Q. Showing you State's Proposed Exhibit 38, what is that, Officer?

"A. This is a statement of rights card. I advised Mr. Moran of his rights prior to the interview.

"Q. And on what day did you do that?

"A. It would have been May 13th.

"Q. And is there a place for his signature?

"A. Yes, there is.

"Q. Did you ask him to sign?

"A. I don't recall if I asked him or not.

"Q. Did he sign?

"A. No.

" . . ."

(Emphasis added.)

The testimony established the inability of the State to prove a waiver on the part of the defendant. Unfortunately defense counsel did not recognize the need for his objection at that point. Notwithstanding the absence of an objection, the trial judge called counsel into chambers and afforded defense counsel an opportunity to object to the admission of evidence:

"THE COURT: [Speaking to defense counsel] Are you going to object to this testimony that comes out of this interview? I don't know what it is.

"[Answer]: For this reason, your Honor, I've had no indication from my client that his rights were violated for the reason of not having the card filled in. I don't see an objection.

"THE COURT: What's the testimony going to be?

"MR. LAMBERT: He's going to admit, your Honor, to Lieutenant Christie that he wrote the note and that he underlined the passages in the book, and that he had highlighted the Popular Mechanics book to catch Gerald Taft's attention.

"THE COURT: What's the note?

"MR. LAMBERT: The note is the note that is the basis of Count I of the information that he -- the note, 'Hey, bro, you better change your testimony, money or whatever it takes to change your testimony.'

"THE COURT: I'm going to refuse the testimony on the grounds the officer's failed to properly obtain an oral waiver of rights pursuant to Exhibit 38 and if you want to make a record, you can make it."

In substance, Mr. Lambert, the deputy county attorney, explained that

through the testimony of Lieutenant Christie the defendant was going to admit facts showing that he was guilty of witness tampering. Without exhibit 38, the confession of the defendant was not admissible. Unfortunately defense counsel failed to recognize the requirement of a proper objection. On its own motion the trial court was compelled to reject the testimony even though no objection had been made.

At that point, the State made an offer of proof and the trial proceeded. Three more witnesses testified before trial was concluded for the day. The following day, before commencement of the trial, the court made the following ruling:

"Let the record show we're outside the presence of the jury. After some agonizing thought on this matter, gentlemen -- let the record show the

defendant is present, represented by [counsel]. Mr. Lambert is present. I am regretfully concluding that [defense counsel] does not have the sufficient experience to try this case, and that is no reflection on you . . . . I was in a similar situation when I was in your shoes, but the constitution requires that the Defendant be guaranteed effective assistance of counsel, and I'm going to conclude that he does not have that, and I'm going to grant on my own motion a mistrial and I'm going to find that manifest necessity dictates that matter be retried and that the bars of double jeopardy do not prevent a retrial."

We conclude that the trial judge acted rationally, carefully considering the difficult situation with which he was confronted. Certainly he was reasonable in perceiving that counsel's

performance the previous day was ineffective. Had the trial judge not stepped in, highly prejudicial evidence would have been admitted for the lack of a proper objection. We observe in the record other instances of defense counsel's performance which also support the trial court's conclusion. We have been convinced that the trial court exercised sound discretion.

Because mistrial is an extreme remedy, a trial judge should carefully consider alternatives. No reasonable alternatives have been suggested. A continuance until a new defense counsel was sufficiently familiarized with the case would have resulted in an unnecessary delay. Cautionary instructions would not have been adequate. We conclude no reasonable alternative to mistrial has been shown.

The respondent argues the trial court should have inquired into the tactics or plans of defense counsel. Tactics were not an issue. There is no question of trial tactics when counsel fails to properly object to the admission of damaging evidence in the absence of a proper foundation. By this opinion we do not intend to criticize the defense counsel. The record demonstrates he applied himself diligently in the performance of his duties. Unfortunately because of a lack of experience, he did not recognize steps required to protect the defendant.

The dissents suggest that we should apply the two-pronged Strickland test to the trial court's determination. The second prong of that test requires the defendant to show that the deficient performance

prejudiced the defense and that the errors were so serious as to deprive the defendant of a fair trial. Clearly that test was established for the consideration of the action taken in the course of a complete trial. While the record demonstrates the conclusion of the trial judge that there was a prejudice to the defense, there is no way of showing whether or not the conduct deprived the defendant of a fair trial unless the trial had been allowed to go to a conclusion. Under this circumstance, we conclude that the Strickland test is not applicable to the present case. Here the determination was made after one day of trial. As previously stated, we conclude that the standard upon review of a decision to order mistrial is whether the trial court exercised sound discretion.

We conclude that the trial judge exercised sound discretion when he found manifest necessity for mistrial. We also conclude that there was no basis for reversal of that decision by the subsequent trial judge who granted the dismissal of all charges against the defendant.

The defendant has argued that retrial is barred regardless of our decision to affirm the trial judge's finding of manifest necessity. The essence of this argument is that the Eighteenth Judicial District has failed to properly fund the public defender program and failed to properly train public defenders. We do not have any evidence before us to consider this question and conclude that this issue is not properly before us.

We reverse the order dismissing the charges on the grounds of double

jeopardy and remand the case for a new trial.

* * * * *

Mr. Justice Sheehy, dissenting:

I dissent from the foregoing opinion, and would uphold district judge Byron Robb that the principle of double jeopardy applies in this case.

The crucial question in this case is whether the other district judge acted out of "manifest necessity" in declaring a mistrial under his perception that Moran was not receiving effective assistance of counsel.

The duty of the District Court, if in a criminal case it sees a necessity to declare a mistrial on its own volition, is to exercise that power "with the greatest caution under urgent circumstances and for very plain and obvious causes." United States v. Perez (1824), 9 Wheat. 579, 580, 22

U.S. 579, 6 L.Ed. 165. The judge's decision on appeal should be strictly scrutinized. The appellate court has an obligation to satisfy itself that the trial judge exercise sound discretion in declaring a mistrial. United States v. Sanders (9th Cir. 1979), 591 F.2d 1293, 1296, 1297.

Here the trial judge, after one day's trial and the testimony of three witnesses for the State, acting on his own, and against the objection of the State, declared a mistrial for his perception that Moran was receiving ineffective assistance of counsel. He may have felt he had an obvious cause, but the circumstances were not urgent, as required in Perez. At that point in the trial the district judge had any number of options. He could grant a continuance; he could appoint co-counsel to act with the defendant's

appointed counsel; he could await the outcome of the trial, and, if necessary, grant a new trial. Section 46-16-702, MCA. In fact ineffective assistance of counsel gives rise to a right of appeal after conviction, for which the conviction may be reversed. State v. LaValley (1983), 203 Mont. 393, 661 P.2d 869.

If the trial judge had taken any one of the foregoing steps, and there are any number of other actions he might have taken, the State's right of trial and the defendant's right to a fair trial would have been preserved. By taking the action of declaring mistrial, he knowingly accepted the risk of double jeopardy dismissal, and now probably necessitated dismissal for want of a speedy trial by reason of institutional and prosecutional delay.

Worse, the action of the District Court placed the county attorney's office in a very comprising situation. When the court proposed to grant a mistrial on its own motion, the prosecuting attorney objected. In essence the State was then claiming that there was no ineffective assistance of counsel and that the trial must go on. Now, after the mistrial was declared, and the matter is before us on appeal, the State must take an opposite stance. It must now contend and does contend that the trial judge correctly perceived ineffective assistance of counsel.

Contrary to the majority opinion, the record bears out that counsel was indeed effective in defending Moran. We cite from defendant's brief before us, facts borne out by the record. The attorney was appointed as public

defender for Moran on April 23, 1986. Thereafter he attended all court hearings including an omnibus hearing where he appropriately reserved motions for future hearing on procuring the appearance of witnesses, a motion for delay of prosecution, and a motion to inquire as to the reasonableness of the bail. As a result of his efforts, the bond was reduced from $5,000 to $2,500.

In preparation for trial, on June 4, 1986, he filed a motion in limine with an accompanying brief. On June 12, 1986, he filed a brief in opposition to the State's motion to consolidate pending charges against Moran. On the same day he resisted the State's motion to endorse additional witnesses and filed a motion to dismiss and accompanying briefs.

When the court ruled on June 16, 1986, that the charges would be

consolidated he immediately requested a continuance in order to prepare for trial. He filed a request to secure the attendance of out of state witnesses.

On September 22, 1986, when the county attorney requested another order to endorse additional witnesses, it was objected to by the defense counsel. He opposed granting a motion for immunity to one of the State's witnesses, and renewed a motion to dismiss any conspiracy charges.

During the course of the trial, defense counsel made a motion for a mistrial based on the violation of court's order that the State's witnesses would not discuss their testimony with other State witnesses.

The trial judge never did learn the trial tactics of the defense counsel before granting the motion.

While the matter was still in District Court, before a second district judge, the defendant filed an affidavit in which he stated that he and his attorney thoroughly discussed the defense of his case and he was aware of the tactics of his defense counsel to impeach the credibility of the State's witnesses. The defense counsel himself has filed an affidavit stating that he had decided to pursue the tactic of allowing as much introduction of evidence from the State's witnesses as possible as his defense lay in impeaching the credibility of those witnesses. For those reasons, he chose not to object to the testimony that otherwise could have been objected to as hearsay or on other grounds. Again, this attorney confirms that he discussed these matters with his client who acquiesced in the trial tactics.

We adhere to the standard of Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, that ineffective assistance of counsel requires a showing that defense counsel's performance was unprofessionally deficient and that the defendant was actually prejudiced. We do not know from the record here that Moran was prejudiced by his counsel's decision to allow the testimony which so disturbed the District Court. The record was not allowed to accumulate.

Trial tactics of counsel are not for trial courts to mandate as was correctly expressed by Judge Robb in ruling that double jeopardy had occurred:

"Every lawyer must have a first jury trial some time and the fact that it was [the defense counsel's] first cannot alone be considered to render

him ineffective, and while a trial judge is to see that both sides in any law suit receives a fair trial and that counsel observe the rules of the court, he or she must ordinarily let counsel try the case in their own way for reasons they deem best. Otherwise, the judge becomes an advocate rather than an arbitrator.

"Constitutional rights must be closely guarded, and while at times there may be competing rights and one must take precedence over another, in the case at hand I cannot find any just cause for defendant Moran to again be subjected to the jeopardy of a trial, when he in no way sought, or requested, or caused the mistrial."

There is no manifest necessity in this case because there was no urgency of circumstances which required the mistrial. Kenneth N. Moran, having

been once in jeopardy, is entitled to be discharged from these charges. I trust that Moran's present defense counsel will seek review of this decision in the highest court of the land, because the result is patently unjust.

* * * * *

Mr. Justice Hunt, dissenting:

I concur in Mr. Justice John C. Sheehy's dissent.

The majority today provides the means by which the defendant may be tried twice for the same offense. Accordingly I dissent.

In its opinion, the majority holds that the substitute judge should not be accorded the same deference upon review as is normally accorded trial courts because it reviewed only a partial transcript of the proceedings. It then proceeded to discuss the incident that

was a "graphic example" of counsel's inexperience, namely failing to object to an improperly filled out rights cards. It was the partial transcript of this incident that the substitute judge reviewed along with the parties' briefs and District Court record, and it was this incident which the substitute judge found was not manifest necessity for a mistrial. It seems incongruous that the majority should complain that the substitute judge considered exactly those transcript pages upon which the majority itself in large part bases its opinion.

It is clear to me that the substitute judge should have been given more deference by the majority than he was. Declaring a mistrial is an extreme measure which should be used with great caution. State v. Carney (Mont. 1986), 714 P.2d 532, 535, 43

St.Rep. 54, 59. Reviewing courts must be satisfied that the trial court exercised sound discretion in declaring a mistrial. Arizona v. Washington (1978), 434 U.S. 497, 514, 98 S.Ct. 824, 835, 54 L.Ed.2d 717, 733. Even after viewing the most "graphic example" of the defendant's attorney's inadequate representation the substitute judge found no manifest necessity. The trial court cited no particular incident that prompted its action, nor has the majority explained any other event that showed inadequate representation other than the one also reviewed by the substitute judge. It seems to me that the substitute judge balanced the defendant's constitutional interest with the public's interest in prosecution and, not surprisingly, came out in favor of the Constitution.

Montana has adopted and refined the two-pronged test for ineffective assistance of counsel set out by the United States Supreme Court in Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. See, State v. Robbins (Mont. 1985), 708 P.2d 227, 42 St.Rep. 1440. The Strickland test is as follows:

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a

defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687.

In Robbins, this Court stated that a counsel's assistance is constitutionally effective if he or she acts "'within the range of competence demanded of attorneys in criminal cases.'" Robbins, 708 P.2d at 231, quoting State v. Rose (1980), 187 Mont. 74, 86, 608 P.2d 1074, 1081. If an attorney's conduct fails this first step then it must be shown that the error resulted in prejudice and '"stemmed from neglect or ignorance rather than from informed professional deliberation."' Robbins, 708 P.2d 185, 189, quoting State v. Morigeau (1982), 202 Mont. 36, 44, 656 P.2d 185, 189.

Robbins concerned the defendant's claim that his attorney had, inter alia, failed to make a motion to suppress some properly seized evidence, namely stolen guns. This Court discovered nothing in the record that supported any of the defendant's claims.

In fact, the failure to make the above motion was sound professional judgment considering there were no irregularities in Robbins' arrest or in the seizure of the evidence. Robbins, 708 P.2d at 232. Of particular interest is the recent decision of State v. Probert (Mont. 1986), 719 P.2d 783, 43 St.Rep. 988, in which the court held that although counsel's failure to object to hearsay was error, it was not prejudicial. The Court also recognized that "[t]here is a difference between ineffective assistance and counsel's

tactical decisions in defense of a case." Probert, 719 P.2d at 787.

Defendant argues that what Judge Olson perceived as ineffective assistance of counsel was in fact a tactical plan designed to promote the eventual impeachment of the State's witnesses. Moran's counsel made many appropriate motions and objections before and after trial. There appears to be only one place during the trial proceedings where Judge Olson was concerned with defense counsel's conduct. This instance was thoroughly examined by the substitute judge and found not to rise to the level of ineffective assistance of counsel. This conclusion deserves every deference normally accorded trial court decisions.

* * * * *

Mr. Justice Sheehy, concurring.

I concur in Justice Hunt's dissent.

STATE REPORTER
Box 749
Helena, Montana 59624

VOLUME 45

No. 87-155

STATE OF MONTANA,

Plaintiff and Appellant,

v.

KENNETH N. MORAN,

Defendant and Respondent.

Submitted: Jan. 15, 1988
Decided: Apr. 21, 1988

CRIMINAL LAW, Forgery--ATTORNEYS AT LAW, Appeal from order granting dismissal of four criminal charges against defendant where the trial judge on his own motion declared a mistrial based on ineffective assistance of counsel. The Supreme Court held that the trial judge exercised sound discretion when he found manifest necessity for mistrial, and there was no basis for reversal of that decision by the subsequent trial judge who granted dismissal of all charges against defendant.

Appeal from the Eighteenth Judicial District Court, Gallatin County, Honorable Byron L. Robb, Judge

For Appellant: Mike Greely, Attorney General, Helena

Robert F. W. Smith, Assistant Attorney General
Mike Salvagni, County Attorney, Bozeman
Marty Lambert, Deputy County Attorney

For Respondent: Leanne Schraudner Lilly, Andriolo & Schraudner; Bozeman
Richard Nellen, Bozeman

Opinion by Justice Weber; Chief Justice Turnage and Justices Harrison, Gulbrandson and McDonough concur. Justice Hunt dissents and filed an opinion in which Justice Sheehy joins.

Reversed and remanded.

[45 St.Rptr. 703]

Mr. Justice Weber delivered the Opinion of the Court.

The State of Montana appeals an order granting dismissal of four criminal charges against the defendant in the Eighteenth Judicial District, Gallatin County. We reverse and remand for trial.

The issue is whether the District Court committed error by granting defendant's motion to dismiss.

In May, 1986, Mr. Moran was charged with the crime of forgery by accountability or in the alternative, conspiracy to commit forgery. Later that month he was charged with two counts of witness tampering. The two cases were consolidated by the District Court, and trial began on September 22, 1986. The jury was empaneled and sworn on that day, and the prosecution presented six witnesses. This was defense counsel's first felony criminal trial before a jury. On the morning of the second day of trial, before any more testimony was offered, the trial judge on his own motion declared a mistrial. The basis for this action was the court's belief that defendant was being denied effective assistance

of counsel and that manifest necessity required mistrial. The defense raised no objection to mistrial, although the State did object.

The court scheduled the matter for retrial in November, 1986. As the parties prepared for retrial, the original trial judge was substituted. The substitute judge then ordered briefs on the issue of retrial and double jeopardy, pursuant to defendant's motion to dismiss. Subsequently, this substitute judge granted the motion.

Did the District Court commit error by granting defendant's motion to dismiss?

We accord great deference to the trial judge's findings and conclusions when the judge heard the witnesses and observed their demeanor. Similarly, we accord deference to the trial judge's

judgment as to competence of counsel when the judge heard and observed his performance as criminal defense counsel, both in chambers and in the courtroom during voir dire and trial. The substitute judge likewise should accord deference to the original trial judge on these matters. The substitute judge in effect reversed the trial judge, having reviewed only seven pages of a trial transcript which when complete contains 221 pages of voir dire, testimony, and in-chambers discussions. For these reasons, the substitute judge's order of dismissal will not receive the same deference as the action by the trial judge.

We now consider whether the trial judge abused his discretion in finding manifest necessity for mistrial. The trial judge's action was motivated by his concern for defendant's

constitutional right to effective assistance of counsel. Because the decision to order mistrial was made to protect defendant's constitutional interests, that decision will receive a high degree of deference on review. See United States v. Sanders (9th Cir. 1979), 591 F.2d 1293, 1297 (stating "A trial judge's decision to declare a mistrial because of possible juror bias is also deserving of great deference."); see also Wright v. United States (D.C. 1976), 365 A.2d 365. The defendant's interest in effective assistance of counsel, however, must be considered in light of his Fifth Amendment right not to be placed twice in jeopardy. Jeopardy attaches when the jury is empaneled and sworn. State v. Carney (Mont. 1986), 714 P.2d 532, 535, 43 St.Rep. 54, 58. In this case, jeopardy had attached. The

constitutional protection against double jeopardy bars a second criminal trial "unless there was a 'manifest necessity' to terminate the trial or defendant acquiesced in the termination." Carney, 714 P.2d at 535.

If the trial judge exercised sound discretion, if he acted rationally and responsibly, his order of mistrial will be affirmed. Arizona v. Washington (1978), 434 U.S. 497, 514, 98 S.Ct. 824, 54 L.Ed.2d 717. Upon review, "[t]he record must support the explicit or implicit finding of manifest necessity." United States v. Jarvis (9th Cir. 1986), 792 F.2d 767, 769. Our review of the record convinces us that the trial judge acted responsibly, exercising sound discretion when he found manifest necessity for a mistrial.

The trial judge concluded that counsel was too inexperienced to defend a major felony charge involving conspiracy and accountability theories. One example was the failure of defense counsel to object to the admission of State's exhibit 38 which was the foundation for an alleged admission or confession of the defendant. Exhibit 38 was offered in evidence through a deputy sheriff. Exhibit 38 was a "rights" card, which contained a Miranda statement of the defendant's right against self-incrimination and his right to assistance of counsel. This particular form provided a line for the defendant's signature if he made a signed waiver. The defendant here had not signed that line. The form also provided a space where the deputy could write down the answer of the defendant when he was asked "Do you

want to use any of these rights before we ask you questions?" The officer testified that he had not filled out that blank and that he could not explain why he had failed to get either the defendant's signature for a written waiver or why he failed to record an oral waiver. Defense counsel did not make any objection at that point. Notwithstanding the absence of an objection, the trial court called counsel into chambers and afforded defense counsel an opportunity to object to the admission of evidence. The court inquired as to the testimony which was going to come in and was advised as to the nature of the confession type evidence. At that point, even though counsel for the defense had still failed to make any objection, the court refused the testimony on the grounds that the

officer failed to properly obtain an oral waiver of rights.

The following day, before the commencement of trial, the court made the following ruling:

"Let the record show we're outside the presence of the jury. After some agonizing thought on this matter, gentlemen -- let the record show the defendant is present, represented by [counsel]. Mr. Lambert is present. I am regretfully concluding that [defense counsel] does not have the sufficient experience to try this case, and that is no reflection on you . . . . I was in a similar situation when I was in your shoes, but the constitution requires that the Defendant be guaranteed effective assistance of counsel] and I'm going to conclude that he does not have that, and I'm going to grant on my own motion a mistrial and

I'm going to find that manifest necessity dictates that matter be retried and that the bars of double jeopardy do not prevent a retrial."

Counsel for the defendant argues that the record reflects that the defendant voluntarily and intelligently waived his rights prior to the confession. They cite State v. Blakney (1982), 641 P.2d 1045, 197 Mont. 131, where this Court pointed out that the existence of a valid waiver depends in each case upon the particular facts and circumstances, including the background, experience and conduct of the accused and other appropriate considerations including the age, education and intelligence of the accused and his capacity to understand the warnings and the consequences of waiving those rights. In addition this Court pointed out that a valid waiver

must include an actual relinquishment of the benefits as evidenced by the actions or statements of the accused. The record contains substantial evidence to support the conclusion of the District Court that the State had failed to properly obtain an oral waiver of rights so that the defendant's admission or confession was not admissible in evidence.

We conclude that the trial judge acted rationally, carefully considering the problems of the difficult situation with which he was confronted. There is substantial evidence from which to conclude that counsel's performance had been ineffective. There is substantial evidence to support the conclusion that highly prejudicial evidence would have been admitted for the lack of a proper objection if the trial judge had not

stepped in. We conclude that the trial court exercised sound discretion.

Because mistrial is an extreme remedy, a trial judge should carefully consider alternatives. No reasonable alternatives were suggested in this case. A continuance until a new defense counsel was familiarized with the case would have resulted in an unnecessary delay, Cautionary instructions would not have been adequate. No reasonable alternatives were presented.

Defense counsel argues that the trial court should have considered the tactics of counsel for the defendant. Having concluded that the failure to object to the rights card and the admission testimony was highly prejudicial to the defendant, there remains no question of trial tactics. Counsel failed to object to the

admission of damaging evidence in the absence of a proper foundation. We conclude that the trial judge was in the best position to judge the performance of counsel and the effect of the evidence, and the record supports his judgment. By this opinion we do not intend a criticism of the defense counsel. The record demonstrates that he applied himself diligently in the performance of his duties, but that he had insufficient experience to recognize the extent of his duties.

The argument is made that we should apply the two-pronged Strickland test to the trial court's determination. The second prong of that test requires the defendant to show that the deficient performance prejudiced the defense and that the errors were so serious as to deprive

the defendant of a fair trial. That test was established for the review of actions taken in the course of a completed trial. There is no way of showing in the present case whether the conduct deprived the defendant of a fair trial because a mistrial was declared. We conclude that the Strickland test is not applicable. As previously stated, we conclude that the standard upon review of a decision to order mistrial is whether the trial court exercised sound discretion.

We conclude that the trial judge exercised sound discretion when he found manifest necessity for mistrial. We also conclude that there was no basis for reversal by the subsequent trial judge who granted the dismissal of all charges against the defendant.

We reverse the order dismissing the charges on grounds of double

jeopardy and remand the case for a new trial.

* * * * *

Mr. Justice Hunt dissenting:

The majority today provides the means by which the defendant may be tried twice for the same offense. Accordingly, I dissent.

In its opinion, the majority holds that the substitute judge should not be accorded the same deference upon review as is normally accorded trial courts because it reviewed only a partial transcript of the proceedings. It then proceeded to discuss only one incident that was an "example" of counsel's inexperience, namely failing to object to an improperly filled out rights cards. It was the partial transcript of this incident that the substitute judge reviewed along with the parties' briefs and District Court record, and

it was this incident which the substitute judge found was not manifest necessity for a mistrial. Although the majority has reviewed the whole record, it does not point to any other example of "ineffectiveness" and confines itself to a discussion of the very incident the substitute judge reviewed.

It is clear to me that the substitute judge should have been given more deference by the majority than he was. Declaring a mistrial is an extreme measure which should be used with great caution. State v. Carney (Mont. 1986), 714 P.2d 532, 535, 43 St.Rep. 54, 59. Reviewing courts must be satisfied that the trial court exercised sound discretion in declaring a mistrial. Arizona v. Washington (1978), 434 U.S. 497, 514, 98 S.Ct. 824, 835, 54 L.Ed.2d 717, 733. The majority has discussed only one

instance of defense counsel's possible "inadequacy." The trial court cited no particular incident that prompted its action, nor has the majority explained any other event that showed inadequate representation other than the one also reviewed by the substitute judge. It seems to me that the substitute judge balanced the defendant's constitutional interest with the public's interest in prosecution and, not surprisingly, came out in favor of the Constitution.

Montana has adopted and refined the two-pronged test for ineffective assistance of counsel set out by the United States Supreme Court in Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. See, State v. Robbins (Mont. 1985), 708 P.2d 227, 42 St.Rep. 1440. The Strickland test is as follows:

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Strickland, 466 U.S. at 687.

In Robbins, this Court stated that a counsel's assistance is constitutionally effective if he or she

acts "'within the range of competence demanded of attorneys in criminal cases.'" Robbins, 708 P.2d at 231, quoting State v. Rose (1980), 187 Mont. 74, 86, 608 P.2d 1074, 1081. If an attorney's conduct fails this first step then it must be shown that the error resulted in prejudice and "'stemmed from neglect or ignorance rather than from informed professional deliberation.'" Robbins, 708 P.2d at 231, quoting State v. Morigeau (1982), 202 Mont. 36, 44, 656 P.2d 185, 189. Robbins concerned the defendant's claim that his attorney had, inter alia, failed to make a motion to suppress some properly seized evidence, namely stolen guns. This Court discovered nothing in the record that supported any of the defendant's claims.

In fact, the failure to make the above motion was sound professional

judgment considering there were no irregularities in Robbins' arrest or in the seizure of the evidence. Robbins, 708 P.2d at 232. Of particular interest is the recent decision of State v. Probert (Mont. 1986), 719 P.2d 783, 43 St.Rep. 988, in which the court held that although counsel's failure to object to hearsay was error, it was not prejudicial. The Court also recognized that "[t]here is a difference between ineffective assistance and counsel's tactical decisions in defense of a case." Probert, 719 P.2d at 787.

I disagree with the majority's assertion that the Strickland test is not applicable to the case at hand because it was not a completed trial. The United States Supreme Court does not limit its decision in such a manner. In fact, Strickland itself arose not out of a trial proper but out

of a post-trial capital hearing proceeding which the court claimed was "adversarial" enough in nature to warrant application of the test. The proceeding we are concerned with was an actual trial, although an uncompleted one. Perhaps the full Strickland test is not appropriate in proceedings terminated sua sponte by the presiding judge but its general thrust is, especially when the trial is interrupted because the court feels ineffective assistance is taking place. If we do not measure the court's soundness of decision in a manner at least similar to Strickland, how else are we to review the decision?

Defendant argues that what Judge Olson perceived as ineffective assistance of counsel was in fact a tactical plan designed to promote the eventual impeachment of the State's

witnesses. Moran's counsel made many appropriate motions and objections before and after trial. There appears to be only one place during the trial proceedings where Judge Olson was concerned with defense counsel's conduct. This instance was thoroughly examined by the substitute judge and found not to rise to the level of ineffective assistance of counsel. This conclusion deserves every deference normally accorded trial court decisions.

* * * * *

Mr. Justice Sheehy, concurs in the foregoing dissent.

IN THE DISTRICT COURT OF THE EIGHTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF GALLATIN

THE STATE OF MONTANA, Plaintiff,	)	
v.	)	Criminal
KENNETH N. MORAN,	)	No. 86-151A No. 86-067A
Defendant.	)	

ORDER GRANTING MOTION TO DISMISS ON GROUNDS OF DOUBLE JEOPARDY

The charges against defendant in the above entitled matters proceeded to jury trial on September 22, 1986, and on September 23 the court on its own motion ordered a mistrial. Resident district judge Thomas A. Olson thereafter disqualified himself, the cases were referred to several other judges, and on December 11, 1986, the undersigned assumed jurisdiction and entered a written order for briefs.

Briefs were thereafter filed by new counsel for defendant and by the Gallatin County Attorney's office, which the court has read and considered, as well as most of the cases cited by counsel, and the court has also reviewed the files in said cases and determines oral argument or testimony is unnecessary.

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

A. That defendant's motion to dismiss the charges filed herein against defendant, Kenneth N. Moran, for forgery and conspiracy to commit forgery (cause 86-051A), and tampering with witnesses and informants (cause 86-067A), is granted, and all four of said charges are dismissed with prejudice.

B. That this order of dismissal is final and appealable, and is hereby certified as such.

C. That in the event no notice of appeal is filed by plaintiff State of Montana within sixty-one (61) days hereafter, the clerk of court shall remit and refund the $5,000.00 bail bond posted for defendant to his mother, Mrs. Anne T. Moran, of San Diego, California. However, if the state files a notice of appeal within said 61 days, the clerk shall retain and hold said bond in an interest bearing account until the appeal is completed or further order of this court.

D. That this order in no way restricts or limits any alleged victim herein from pursuing any civil remedies or actions that he or she may have against defendant.

E. That this order makes no conclusion about the Gallatin County public defender training or funding circumstances. However, it should be noted that anyone admitted to practice of law in Montana can immediately become a county attorney or a public defender, taxpayers have to pay for both, and there is a limit to what taxpayers can or should have to pay for prosecution and defense of those charged with crime, as well as for board, room, medical attention, clothing and recreation of indigent defendants.

DATED this 8th day of January, 1987.

BYRON L. ROBB
District Judge Presiding

EXPLANATORY COMMENT

This order of dismissal may seem harsh and prejudicial to the state's interests herein when the county attorney's office was in no way at fault in causing a mistrial, and even objected to it, but the plain words of the fifth amendment to the U.S. Constitution and section 25 of article II of the Montana constitution concerning double jeopardy cannot be ignored.

There is no question that defendant has been once in jeopardy on four felony charges in two different cases, which had been consolidated for trial, as a jury had been selected and sworn and three witnesses testified. At that point, trial judge Olson on his own motion declared a mistrial because he felt court-appointed defense counsel was not effectively representing Moran.

The only reasons apparent in the record and partial transcript attached to present defense counsel Schraudner's brief were that trial defense counsel Nellen did not object to some hearsay testimony and to introduction of an unsigned advice of rights card. However, defendant and Nellen both submitted affidavits indicating this was a conscious decision on their part and some of their trial strategy to test the credibility of the state's witnesses. The case was apparently Nellen's first criminal jury trial.

I believe it is significant to note that the court files indicate Mr. Nellen attended and participated in defendant's arraignment and later omnibus hearing in each case separately, and afterwards in at least five more hearings on motions. He also filed motions to reduce Moran's bail

bond and successfully obtained orders; and filed numerous other well prepared motions, with briefs, some of which were ruled on and some not, so that he certainly was not derelict or ineffective in any apparent way before trial.

I conclude from examination of the two court files and said briefs that the facts fall far short of the "manifest necessity" rule enunciated by the U.S. Supreme Court and numerous other state and federal tribunals, citations of which are in present counsels' briefs herein, which rule does permit retrial of an accused after granting of a mistrial in limited situations. The most frequent exception is when there is a "hung jury", meaning that after due and prolonged deliberation, a jury simply cannot agree on a verdict. Other

ingly clear exceptions would be where a calamity or natural disaster prevents completion of a case, such as death or disability of the judge or counsel. However, the decisions indicate that no hard and fast or mechanical rule can be laid down, but to avoid application of the constitutional mandate against double jeopardy, the circumstances must be extremely urgent and without reasonable alternative, especially where it is not the defendant who seeks the mistrial ruling.

In this instance, Judge Olson obviously was seeking to see that defendant had effective and competent counsel and to assure Moran a fair trial, but Moran voiced no objection to his attorney at any time, and the record does not indicate other less drastic alternatives were considered,

such as instructing the jury to disregard certain testimony, continuing the trial for a day or so, or appointing other co-counsel for defendant. Lastly, although Judge Olson asked Nellen if he was going to object to said evidence, the judge did not inquire of Nellen's trial strategy. Disclosing this may not have been agreeable to defense counsel, but he wasn't asked.

The legal doctrine or rule involved was expressed a long time ago by Justice Story in U.S. v. Perez, 9 Wheat 579, 6 L.Ed. 165 (1824) and has been cited innumerable times since as follows:

> "We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a

> manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office." (Emphasis supplied)

More recent applications or refinements of the rule are set forth in U.S. v. Dinitz, 424 U.S. 600, 92 S.Ct. 1075, 47 L.Ed. 2nd 267 (1976); Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed. 2nd 425 (1973);

and Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed 2nd 717 (1978). A recent Montana case from Bozeman adopts this standard and applies it under somewhat different circumstances in State v. Carney, ___ Mont. ____, 714 P2d 532, 43 SR 54 (1986) wherein the state appealed an evidenciary ruling in mid-trial, thereby necessitating the jury's dismissal before reaching a verdict. Retrial was prohibited.

Also of interest is another recent Montana case, State v. Probert, ___ Mont. ____, ___ P2d ____, 43 SR 988 (1986), concerning effectiveness of counsel, which states in part at page 992:

> Counsel's failure to object to hearsay was error . . . However, we cannot say that the error was so prejudicial as to undermine confidence in the outcome of the case.

* * *

> Counsel's failure to raise the constitutional challenge is not error. There is a difference between ineffective assistance and counsel's tactical decisions in defense of a case. We have held before that the decision of whether or not to challenge the constitutionality of a statute is a matter of legal judgment. (Emphasis supplied)

Every lawyer must have a first jury trial some time, and the fact that it was Mr. Nellen's first cannot alone be considered to render him ineffective, and while a trial judge is to see that both sides in any lawsuit receive a fair trial and that counsel observe the rules of court, he or she must ordinarily let counsel try the case in their own way for reasons they deem best. Otherwise, the judge becomes an advocate rather than an arbiter.

Constitutional rights must be closely guarded, and while at times there may be competing rights and one must take precedence over another, in the case at hand I cannot find any just cause for defendant Moran to again be subjected to the jeopardy of a trial, when he in no way sought, requested or caused the mistrial. As I was called in to assume jurisdiction after the mistrial was granted, I have had the advantage of counsel's briefs and time to consider the cases cited, which Judge Olson did not in the middle of the trial, but under the circumstances I conclude there was no high degree of necessity for the mistrial and that the charges must be dismissed.

DATED this 8th day of January, 1987.

BYRON L. ROBB
District Judge Presiding

IN THE DISTRICT COURT OF THE EIGHTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF GALLATIN

STATE OF MONTANA,

Plaintiff,

vs.

KENNETH N. MORAN,

Defendant.

Case No. DC-86-51(A)
and
Case No. DC-86-67(A)

* * * * *

AFFIDAVIT

* * * * *

STATE OF MONTANA)
:ss
County of Gallatin)

COMES NOW, RICHARD NELLEN, and hereby states upon oath as follows:

1. That I am the attorney appointed as a public defender with respect to the above cases.

2. That in my preparation for trial in the above cases, I decided to pursue the tactic of allowing as much introduction of evidence through the State's witnesses as possible, as my

defense lay in impeaching the credibility of those witnesses. As such, I chose not to object to information that otherwise could have been hearsay, or objectionable on other grounds.

3. That during the course of the trial, I was reprimanded by Judge Thomas A. Olson for failure to make objections to hearsay and the admission of a rights card.

4. I discussed this approach with my client, Kenneth N. Moran, and he acquiesced in this trial tactic.

FURTHER AFFIANT SAYETH NOT.

DATED this 8th day of January, 1987.

/s/ Richard Nellen
RICHARD NELLEN

SUBSCRIBED AND SWORN to before me this 8th day of January, 1987.

/s/ Sally Perrine Magra
Notary Public for the State of MT
Residing at: Bozeman
My commission expires: 5/10/88

IN THE DISTRICT COURT OF THE EIGHTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF GALLATIN

STATE OF MONTANA,

Plaintiff,

vs.

KENNETH N. MORAN,

Defendant.

Case No. DC-86-51(A) and Case No. DC-86-67(A)

* * * * *

AFFIDAVIT

* * * * *

STATE OF CALIFORNIA)
:ss
County of _____)

COMES NOW, KENNETH N. MORAN, and hereby states upon oath as follows:

1. That I am the defendant named in these charges.

2. That I was represented by Richard Nellen.

3. That Richard Nellen and I discussed thoroughly the defense in this case, and I was aware that our tactics would be to impeach the

credibility of the State's witnesses, in particular, Maryann Abraham.

4. That I have been satisfied with the efforts of my attorney and he still remains counsel of record with respect to this matter.

FURTHER AFFIANT SAYETH NOT.

DATED this 12th day of January, 1987.

/s/ Kenneth N. Moran
KENNETH N. MORAN

SUBSCRIBED AND SWORN to before me this 12th day of January, 1987.

/s/ C.R. Andrews
Notary Public for the State of CA
Residing at: San Diego
My commission expires: 3/29/88

(2)

No. 87-2060

Supreme Court, U.S.
FILED
JUL 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

KENNETH N. MORAN,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

ARGUMENT 2

I. THE MANIFEST NECESSITY STANDARD ... 2

II. INEFFECTIVE ASSISTANCE OF COUNSEL AS "MANIFEST NECESSITY" 3

III. THE DECISION OF THE MONTANA SUPREME COURT IS CONSISTENT WITH THE DECISIONS OF OTHER COURTS 5

IV. SUFFICIENT BIAS WAS SHOWN TO SUPPORT THE MONTANA SUPREME COURT'S AFFIRMATION OF THE TRIAL COURT'S DETERMINATION 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Cases

Abdi v. Georgia, 744 F.2d 1500 (11th Cir. 1984) 6

Arizona v. Washington, 434 U.S. 497, 98 S. Ct. 824 (1978) 2, 7

Braxton v. United States, 395 A.2d 759 (D.C. 1978) 5

Douglas v. United States, 488 A.2d 121 (D.C. 1985) 5

Illinois v. Somerville, 410 U.S. 458, 93 S. Ct. 1066 (1973) 2

Murray v. Carrier, 106 S. Ct. 2639 (1986) 4

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1978) 3, 4

United States v. Horn, 583 F.2d 1124 (10th Cir. 1978) 7

United States v. Perez, 1 U.S. (9 Wheat.) 579, 6 L. Ed. 165 (1824) 2

United States v. Sanders, 591 F.2d 1293 (9th Cir. 1979) 6

United States v. Starling, 571 F.2d 934 (5th Cir. 1978) 7

Wright v. United States, 365 A.2d 365 (D.C. 1976) 6

STATEMENT OF THE CASE

On May 5, 1986, petitioner Ken Moran was charged by information with the crimes of forgery by accountability, a felony, or in the alternative, conspiracy to commit forgery, a felony. On May 28, 1986, Moran was charged with two counts of witness tampering, both felonies. Because the witness tampering "arose" out of the forgery charges, and because much of the same testimony would be required for both trials, the district court ordered consolidation of both cases on June 16, 1986.

Both cases came on for trial before a jury on September 22, 1986. A jury was empaneled and sworn, and during the afternoon of September 22, the State presented the testimony of three witnesses. On the morning of September 23, 1986, before further testimony was heard, the court *sua sponte* declared a mistrial. The court found manifest necessity for its ruling and scheduled a second trial. The matter was then transferred to a second judge. This judge granted the defendant's motion to dismiss the case on grounds of double jeopardy, finding no "manifest necessity."

The State appealed to the Montana Supreme Court, which court reversed the second judge's dismissal of the case and remanded it for a new trial. The Montana Supreme Court, on the basis of a review of the whole record, concluded that "the trial judge exercised sound discretion when he found manifest necessity for mistrial." The petitioner seeks a writ of certiorari from this decision.

———o———

ARGUMENT

I. THE MANIFEST NECESSITY STANDARD.

As the Court is well aware, and as the petitioner has stated, the "classic formulation" of the test to be applied in reviewing the declaration of a mistrial, was Mr. Justice Story's pronouncement in *United States v. Perez,* 1 U.S. (9 Wheat.) 579, 580, 6 L. Ed 165 (1824), that there must be "manifest necessity" for the declaration. Almost 150 years later, this Court offered the following interpretation of "manifest necessity":

> A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial.

Illinois v. Somerville, 410 U.S. 458, 464, 93 S. Ct. 1066, 1070 (1973). In its review of the record in this case, the Montana Supreme Court agreed with the trial judge's determination that the ineffective assistance of defense counsel constituted a "manifest necessity" for declaring a mistrial.

In its assessment of "manifest necessity," this Court has said that it will examine the circumstances surrounding the declaration of a mistrial and as the trial judge's deference to the "public justice" factor increases, a reviewing court's deference to the trial court's determination should likewise increase. *Arizona v. Washington,* 434 U.S. 497, 507-10, 98 S. Ct. 824, 831-32 (1978). In this case, the prosecution vigorously opposed the trial judge's determination that defense counsel's inexperience was resulting in ineffective assistance of counsel and jeopardizing the defendant's right to a fair trial. The trial judge's

decision was clearly made in the interests of public justice on the basis of the facts available to him. That decision should receive a high degree of deference.

II. INEFFECTIVE ASSISTANCE OF COUNSEL AS "MANIFEST NECESSITY."

The Montana Supreme Court declared that, in this case of an interrupted trial, the test set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052 (1978), concerning denial of effective assistance of counsel was not applicable, but that "the standard upon review of a decision to order mistrial is whether the trial court exercised sound discretion." However, in assessing the trial judge's exercise of his discretion in declaring a mistrial due to ineffective assistance of counsel, it is instructive to keep in mind the standards set by this Court for evaluating an attorney's performance.

In *Strickland,* denial of effective assistance of counsel was linked to the defendant's right to a fair trial (466 U.S. at 686, 104 S. Ct. at 2064). Similarly in this case, the trial judge viewed defense counsel's inexperience and courtroom performance in the light of the "public justice" factor and the defendant's right to a fair trial. In addition to the deference due the trial judge's determination because of its basis in "public justice," *Strickland* offers other reasons for deferring to the trial judge.

The ineffective assistance in this case must initially be examined from the vantage point of *Strickland's* two standards: unprofessionally deficient performance and actual prejudice. Undoubtedly, some measure of prejudice results when the defendant is subject to a second

trial. However, as the Montana Supreme Court said, it would be impossible to prove actual prejudice in an interrupted trial. On the other hand, this Court said several things in *Strickland* that indicate that the trial judge is in the best position to assess a deficient performance.

In Section III of the decision, 466 U.S. at 687-90, 104 S. Ct. at 2064-65, this Court refers to counsel's duty to "render the trial a reliable adversarial testing process," the "variety of circumstances faced by defense counsel," the reviewing court's duty to "eliminate the distorting effects of hindsight," and "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." All these factors militate in favor of the reviewing court's deference to the trial court. In this case the Montana Supreme Court properly recognized that the trial judge was not subject to the distorting effects of hindsight, had observed counsel's performance in the circumstances of the trial, and had acted in the defendant's best interests by declaring a mistrial.

In later cases elaborating on the *Strickland* tests for ineffective assistance of counsel, stress has been placed on "external factors." *Murray v. Carrier*, 106 S. Ct. 2639, 2646 (1986). In this case the petitioner attempts to elicit sympathy with allegations regarding the alleged underfunding of the public defender's office. It is not clear whether counsel's inexperience should be viewed as an "internal" or "external" factor in his ineffectiveness (just as the purposefulness of the decision not to contest the introduction of the *Miranda* rights card does not absolve the decision of the criticism that it makes no sense). The respondent submits that the crucial fact here is that the

record does not reveal any attempt by counsel to associate more experienced counsel for trial, thus curing his inexperience.

III. THE DECISION OF THE MONTANA SUPREME COURT IS CONSISTENT WITH THE DECISIONS OF OTHER COURTS.

The federal circuit court decisions which the petitioner cites in support of his position are distinguishable from this case because they involve factors other than counsel's courtroom performance. In *Douglas v. United States,* 488 A.2d 121 (D.C. 1985), for example, although the reviewing court reversed the trial judge's *sua sponte* declaration of a mistrial, the reasons given show that case to be significantly different from the case at bar. In *Douglas,* the trial judge concluded that there was ineffective assistance of counsel because the defendant filed a complaint against his lawyer on an unrelated matter several weeks earlier. The trial judge held a hearing and concluded that counsel's trial performance was not deficient, but the judge concluded that attorney and client had a conflict of interest and that there was no alternative other than to declare a mistrial (488 A.2d at 139). In the case at bar, on the other hand, the trial judge's finding of "manifest necessity" was based solely on counsel's courtroom performance.

In *Braxton v. United States,* 395 A.2d 759 (D.C. 1978), a factor other than counsel's courtroom performance was again found to be the reason for the trial judge's determination of a mistrial. The intense conflict between the defense attorney and the judge was found by the reviewing court to have resulted in the trial judge's discretion being

"improperly influenced by factors extraneous to both the rights of the accused and the public interest in just adjudication." (395 A.2d at 771.) In this case, there has been no allegation that the trial judge's exercise of his discretion was anything other than dispassionate.

The cases of *Abdi v. Georgia*, 744 F.2d 1500 (11th Cir. 1984), and *Wright v. United States*, 365 A.2d 365 (D.C. 1976), are instructive, as they both involved *sua sponte* declarations of mistrial based solely on defense counsel's courtroom performance. In both these cases, reviewing courts upheld the determinations.

IV. SUFFICIENT BIAS WAS SHOWN TO SUPPORT THE MONTANA SUPREME COURT'S AFFIRMATION OF THE TRIAL COURT'S DETERMINATION.

The petitioner seeks to limit the discussion of bias to the introduction of the unsigned rights cards. This was clearly not the sole basis of either the trial judge's or the Montana Supreme Court's decision. As the court makes clear several times (petitioner's appendix at B5, B8, B12, and B14), their decision is based on the whole record and the rights card incident is but a single example.

The cases cited by the petitioner in support of the proposition that bias cannot be assumed may be easily distinguished. In the first place, the Montana Supreme Court did not assume bias, it found it, based on an examination of the entire record. The cases cited by the petitioner all turn on the trial court's unwarranted assumptions of bias. In *United States v. Sanders*, 591 F.2d 1293 (9th Cir. 1979), the court of appeals concluded that the trial court had found prejudice to the defendant based on

a prosecution witness' perjured testimony. However, it was clear to the reviewing court that the perjured testimony would have benefited the defendant. 591 F.2d at 1298. The cases of *United States v. Horn*, 583 F.2d 1124 (10th Cir. 1978), and *United States v. Starling*, 571 F.2d 934 (5th Cir. 1978), involve clearly inadequate interrogations of jurors by trial judges; this case involves a direct observation by the trial judge of an attorney's performance.

The respondent respectfully submits that this Court need not substitute its review of the record in this case for that of the Montana Supreme Court. As this Court said in *Arizona v. Washington, supra:*

> Since the record provides sufficient justification for the state court ruling, the failure to explain that ruling more completely does not render it constitutionally defective.

434 U.S. at 517, 98 S. Ct. at 836.

CONCLUSION

The Montana Supreme Court, after examining the whole record, found that the trial judge in this case had properly determined that the defendant was not receiving effective assistance of counsel, and that there was "manifest necessity" for the declaration of a mistrial. The trial court's decision was based solely on counsel's courtroom performance, and the Montana Supreme Court's decision was consistent with the cases on "manifest necessity" decided by this Court and the lower federal

courts. The petition for certiorari filed herein should not be granted.

Respectfully submitted,

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